SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 4 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 476

JAMES SHROUT, d/b/a THE SHROUT AGENCY,

Petitioner,

vs.

McDONALD'S SYSTEM, INC., an Illinois corporation, and RAY KROC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

WILLARD LASSERS,
11 South LaSalle Street,
Chicago, Illinois 60603,

EDWARD G. LEVINSON,
11 South LaSalle Street,
Chicago, Illinois 60603,

GEORGE C. PONTIKES,
11 South LaSalle Street,
Chicago, Illinois 60603.

Attorneys for Petitioner.

MIDWEST LAW PRINTING CO., 226 N. MICHIGAN, CHICAGO 60601. FINANCIAL 6-2000

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Constitutional Provisions and Statute Involved 3

Questions Presented 3

Statement of the Case 4

Reasons for Granting the Writ 9

I.

The fact finding by the Appellate Court of Illinois, First District, affirmed by the Supreme Court of Illinois, without giving the petitioner the opportunity to have a full and complete hearing, deprived the petitioner of a valuable property right without due process of law 9

II.

The fact finding by the Appellate Court of Illinois, First District, affirmed by the Supreme Court of Illinois, was a complete departure from the Illinois rule of having a jury decide questions of fact where a trial by jury is demanded in apt time, thereby violating the right of petitioner to equal protection of the laws 13

Conclusion 15

Appendix:

A—Opinion of the Appellate Court of Illinois, First District, filed December 1, 1967 ..... 1a

B—Petition for Rehearing, filed January 10, 1968 .. 8a
C—Corrected Opinion of Appellate Court of Illinois, First District, filed January 24, 1968 ..... 16a
D—Petition for Leave to Appeal to the Supreme Court of Illinois, filed February 28, 1968 ..... 22a
E—Denial of Petition for Leave to Appeal, filed May 28, 1968 ..... 37a
F—Issuance of Mandate by Supreme Court of Illinois, dated June 19, 1968 ..... 38a
G—Article II, Section 5, Illinois Constitution of 1870 ..... 39a
H—Chapter 110, Section 48 (Illinois Revised Statutes, 1967) 40a

CITATIONS

Cases:

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 74 L. ed. 1107, 50 S. Ct. 451 (1930) 10
Cochran v. Kansas, 316 U.S. 255, 86 L. ed. 1453, 62 S. Ct. 1068 (1942) 15
Diversey Liquidating Corporation v. Neunkirchen, 370 Ill. 523, 19 N.E. 2d 363 (1939) 14
Hovey v. Elliott, 167 U.S. 409, 42 L. ed. 215, 17 S. Ct. 841 (1897) 11
Manion v. Brant Oil Co., 85 Ill. App. 2d 129, 229 N.E. 2d 171 14
McVeigh v. The United States, 11 Wall. 259, 20 L. ed. 80 (1871) 11
Mullane v. Hanover Trust Co., 339 U.S. 306, 94 L. ed. 865 (1950) 12
Pedrich v. Peoria & Eastern R.R. Co., 37 Ill. 2d 494, 229 N.E. 2d 504 (1967) 14

Sandoval v. Rattikin, 386 U.S. 901, 17 L. ed. 132, 87 S. Ct. 199 (1966) 12
Saunders v. Shaw, 244 U.S. 317, 61 L. ed. 1163, 37 S. Ct. 638 (1917) 10
Shelley v. Kraemer, 334 U.S. 1, 92 L. ed. 1161, 68 S. Ct. 836 (1948) 12, 14, 15
Willoughby v. Moyer, 5 Ill. App. 2d 462, 200 N.E. 2d 522 (1964) 14
Windsor v. McVeigh, 93 U.S. 274, 23 L. ed. 914 (1876) 11
Yick Wo v. Hopkins, 118 U.S. 356, 30 L. ed. 220, 6 S. Ct. 1064 (1886) 15

Constitutional Provisions:
Fourteenth Amendment to the United States Constitution 3
Article 2, Section 5, Illinois Constitution of 1870 ..... 13, 39a

Statute Involved:
Section 48, Chapter 110, Illinois Revised Statute (1967) 13, 40a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No.

JAMES SHROUT, d/b/a THE SHROUT AGENCY,

Petitioner,

vs.

McDONALD'S SYSTEM, INC., an Illinois corporation, and RAY KROC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois entered in the above entitled case on May 28, 1968.

CITATION TO OPINIONS BELOW.

The Circuit Court of Cook County, Illinois filed no opinion. The Appellate Court of Illinois, First District,

filed two opinions. The original opinion was filed on December 1, 1967 (App. 1a)[1]. A corrected opinion was filed on January 24, 1968, after denial of petition for rehearing and is reported in 90 Ill. App. 2d 60, 234 N.E. 2d 451, 1967 (App. 16a). No opinion was filed by the Supreme Court of Illinois.

JURISDICTION.

The Supreme Court of Illinois denied Petition for Leave to Appeal on May 28, 1968 (App. 37a). The mandate of the Supreme Court of Illinois was issued to the Appellate Court of Illinois, First District, on June 19, 1968 (App. 38a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

[1] The symbol (App. ....) refers to the Appendix, *infra*.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

Amendment 14 to the United States Constitution, in pertinent part, reads as follows:

> "... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..."

Article II, § 5 of the Illinois Constitution of 1870 (App. 39a). Chapter 110, § 48 (I.R.S., 1967) (App. 40a).

QUESTIONS PRESENTED.

(1) Does a finding of fact by an Appellate Court, without the opportunity to have a full and complete hearing, constitute a violation of the right to due process of law?

(2) Does a finding of fact by an Appellate Court, which is a complete departure from the state law requiring a jury trial when such is demanded in apt time, violate a right to equal protection of the laws?

STATEMENT OF THE CASE.

During May of 1957, petitioner and McDonald's System, Inc., entered into an oral agreement whereby petitioner agreed to service the advertising needs of McDonald's System, Inc., and McDonald's agreed to pay petitioner a reasonable compensation for such service (A. 2)[2]. Petitioner thereupon devised a unique advertising program for McDonald's, seeking to conserve McDonald's capital and to keep McDonald's borrowing power as unencumbered as possible (A. 2-6). Petitioner was never reasonably compensated for this unique program (A. 6-11), even though McDonald's began to make large sums of money (A. 11).

By the Spring of 1961, petitioner's financial situation was steadily deteriorating, while McDonald's was obviously thriving. McDonald's had not honored certain guarantees, which was the primary cause for petitioner's deteriorating financial condition. McDonald's summoned petitioner to its office in Chicago, Illinois, in Spring, 1961, and informed petitioner that the then existing contractual relationship between McDonald's and petitioner must be terminated and that they must enter into a new written contractual relationship. Though petitioner objected to the restrictive nature of the proposed agreement, McDonald's was immovable and even informed petitioner that the alternative to a new contract was summary dismissal (A. 11-12). As a result of the pressure brought

---

[2] The symbol (A. ....) refers to the Abstract of the Petitioner, filed in the Illinois Appellate Court.

to bear, petitioner signed a written contract with McDonald's which contained the following language:

> "The parties hereto desire to enter into the present agreement and thereby revoke and cancel all previous agreements, contracts and commitments relating to the advertising and promotion programs heretofore entered into by said parties. . . ." (A. 20)

The new contract was signed on June 12, 1961, and on September 1, 1961, a little over two months later, McDonald's gave notice of its intention to terminate petitioner's contract as of December 31, 1961.

The foregoing facts were set forth in count one of the petitioner's amended complaint (A. 2-13). The respondents filed a motion to dismiss the amended complaint, with documents and affidavits attached (A. 20-27). On the narrow basis of that amended complaint and the motion, the trial court dismissed counts one, two and three of the amended complaint. Thereupon, petitioner appealed this order to the Appellate Court of Illinois, First District. No facts were found by the trial court.

The Appellate Court, in its decision of December 1, 1967, as modified on January 24, 1968, stated the following on pages 3 and 4 of the opinion:

> "Plaintiff's Claim under Count I is barred by the contract of June 12, 1961, which expressly states that the parties thereto revoke and cancel 'all previous agreements, contracts and commitments relating to the advertising and promotion programs' theretofore entered between the parties. The contention that an action in *quantum meruit* is 'an action off the contract and not on the contract' is unavailing inasmuch as there did in fact exist between the parties a fully executed express contract. See *Goodman*

v. *Motor Products Corp.*, 22 Ill. App. 2d 378, 384-385. . . .

"The cases cited by Plaintiff in support of his position that an action in *quantum meruit* may be maintained under these circumstances are inapposite on their facts. The parties complaining in those cases received either none or only part of the compensation although the oral contract called for 'reasonable compensation' and plaintiff did not object to the amounts received. See for example *Huehl* v. *Monarch Refrigerating Co.*, 157 Ill. App. 145; *United States* v. *Traylor Bros., Inc.*, 133 F. Supp. 104; *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 161 Fed. 2d 811". (App. 18a-20a)

The only evidence before the trial court and the Appellate Court regarding the alleged "fully executed" oral contract is the following statement from the affidavit of John H. Horn filed in support of respondents' motion to dismiss the amended complaint of petitioner:

"3. Prior to June 12, 1961, Shrout was paid a total of $38,801.88 by McDonald's for all advertising services, advertising and supplies performed and furnished by Shrout pursuant to all oral understandings between Shrout and McDonald's which were then in effect. At no time during this period did Shrout refuse or fail to cash checks in connection with said payments and at no time did he claim that such payments were in violation of any oral understanding with McDonald's. At no time during this period did Shrout claim any interest or property right in any of the ideas, symbols, slogans, designs or other matter produced by him for McDonald's in the course of his advertising agency relationship with McDonald's. . . . ." (Appellees' Supplemental Abstract pp. 31-32).

Petitioner denied that the $38,801.88 was "reasonable compensation" for his services in his answer to the

motion to dismiss the complaint, filed below, and in his affidavit as follows:

> "2. As to the allegations in paragraph 1, Plaintiff denies that he has already been compensated for his services rendered prior to June 12, 1961. Paragraph 7 of the Complaint herein and paragraph 2 (a) of the Affidavit of JAMES SHROUT, cited by the Defendants, clearly recite that the compensation given to the Plaintiff by the Defendant, McDONALD'S SYSTEM, INC., (hereinafter called McDONALD), was wholly inadequate in light of the great number of services performed by the Plaintiff for McDONALD, and the ideas and creations provided for McDONALD by the Plaintiff. Paragraph 3 of the Affidavit of JAMES SHROUT outlines clearly the services, ideas and creations which the Plaintiff produced for McDONALD prior to June 12, 1961. The sum of $38,801.88 paid to the Plaintiff by McDONALD prior to June 12, 1961, for the services, ideas and creations of the Plaintiff, as outlined in the Affidavit of JOHN N. HORN [sic] attached to the Motion, is a pittance in comparison with the reasonable value of Plaintiff's work for McDONALD." (Answer, R. 47)(*).
>
> "2. The Affidavit of JOHN H. HORN contains a number of misstatements and omissions, among which are the following:
>
> "(a) As to Paragraph 3 of the HORN Affidavit, although it is true that prior to June 12, 1961, McDONALD's Licensees paid SHROUT for certain advertising services and merchandise, the HORN Affidavit fails to point out the fact that the sums paid SHROUT were far less than the services rendered by SHROUT to McDONALD, and the debts that SHROUT had to assume on behalf of McDONALD." (Affidavit, R. 54).

(*) The symbol (R. ....) refers to the Record.

Upon filing the original complaint in this matter, petitioner demanded a jury (R. 3).

On May 28, 1968, the Supreme Court of Illinois denied petitioner's petition for leave to appeal from the decision of the Appellate Court (App. 37a). The federal questions were first presented in the petition for leave to appeal (App. 22a).

REASONS FOR GRANTING THE WRIT.

(I)

The fact finding by the Appellate Court of Illinois, First District, affirmed by the Supreme Court of Illinois, without giving the petitioner the opportunity to have a full and complete hearing, deprived the petitioner of a valuable property right without due process of law.

In its opinion, the Appellate Court of Illinois, First District, admitted in substance that the amended complaint of the petitioner stated a good cause of action in *quantum meruit* (App. 18a-20a). However, the Appellate Court further stated that the oral contract between petitioner and respondent, McDonald's, was fully executed; namely that petitioner was fully paid thereunder (App. 19a)[4]. That Court based its finding solely on a paragraph of the affidavit of John H. Horn, attached to respondents' motion to dismiss the amended complaint, *supra* p. 6.

---

[4] The Appellate Court first based this finding of fact upon the alleged fact that respondent McDonald's had received invoices and had paid these invoices, petitioner receiving these payments without protest (App. 2a, 4a). Petitioner pointed out that there was nothing in the pleadings which justified this conclusion in his petition for rehearing (App. 10a). The Appellate Court corrected its opinion on January 24, 1968, by stating that its finding of fact was now based upon the alleged fact that petitioner received payments prior to June 12, 1961, without protest (App. 17a, 18a). This alleged fact was merely a recital in an affidavit, no hearing having been held to give petitioner an opportunity to present evidence.

Petitioner completely denied the statements of this paragraph in count one of his amended complaint (A. 1-13). He also denied the statements in his answer to respondents' motion to dismiss the original complaint of petitioner and his attached affidavit, *supra* p. 7.

In essence, petitioner claimed that he was not fully paid for work done under the oral agreement and respondents claimed that he was. The Appellate Court admitted that petitioner would have a good cause of action in count one if he were not fully paid. It then proceeded to determine that he was fully paid on the basis of conflicting statements in the pleadings, without a prior hearing and finding of fact by the trial court.

In *Saunders* v. *Shaw*, 244 U.S. 317, 61 L. ed. 1163, 37 S. Ct. 638 (1917), a state appellate court determined an issue of fact and entered judgment thereon on the basis of the pleadings alone. The party to whom the finding was adverse had no opportunity to present evidence on that issue. The Court decided that such a finding of fact and judgment was a violation of due process of law, contrary to the Fourteenth Amendment. In the case at hand, the Appellate Court of Illinois found as a fact that petitioner had been fully compensated for his services pursuant to the oral agreement. Thereupon, it affirmed the order dismissing the amended complaint in the trial court below. Petitioner never had the opportunity to present evidence that, in fact, he had not been fully compensated. Such a finding, based on the pleadings alone, deprived the petitioner of a valuable property right, namely his claim of compensation for work done, without due process of law. See also *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673, 74 L. ed. 1107, 50 S. Ct. 45 (1930).

The principle that a person is not to be judged in a court of law without the opportunity for a full and effective hearing has long been established by this Court. In *Hovey* v. *Elliott,* 167 U.S. 409, 42 L. ed. 215, 17 S. Ct. 841 (1897), this Court found that a judgment was void for want of due process of law, because it had been obtained by way of default after the answer of the defendant had been struck as a consequence of the defendant's being found in contempt of court. On the same basis, the dismissal of the claim of petitioner without opportunity to have a full and effective hearing to present evidence that he was indeed not paid for services rendered pursuant to the oral agreement, deprived him of property without due process of law.

In the *Hovey* case, the Court relied upon the prior decisions of *McVeigh* v. *The United States,* 11 Wall. 259, 20 L. ed. 80 (1871) and *Windsor* v. *McVeigh,* 93 U.S. 274, 23 L. ed. 914 (1876). In both of those cases, judgments of forfeiture of property had been entered. In each case, the claimant to the property had entered an appearance and answer and the court had struck both the appearance and answer in each instance, because the claimant was alleged to be an enemy alien, since he was a member of the government of the confederate states. Thereupon, judgment was entered by default and the properties in question were confiscated. In both cases, the Court found that the claimant had been deprived of his property without due process of law, since he had not been given the opportunity to have a full and effective hearing of his claim.

More recently, the Court, in determining that trust companies had to give notice, by mail at least, to beneficiaries whose whereabouts and interests were known to

the trust companies and that notice by publication was not consistent with the due process of law, whenever the rights of such beneficiaries were involved in litigation, stated the following:

> "Many controversies have raged about the cryptic and abstract words of the due process clause, but there can be no doubt that at a minimum they require the deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Trust Company*, 339 U.S. 306, 94 L. ed. 865, 70 S. Ct. 652 (1950).

In the present case, it is clear that petitioner was not given an "opportunity for hearing appropriate to the nature of the case" in order to prove that he was not fully compensated pursuant to the oral agreement. In this connection, we respectfully call attention to the dissenting opinion of Justice Fortas, joined by Justice Douglas, to the denial of Certiorari in *Sandoval* v. *Rattikin*, 386 U.S. 901, 17 L. ed. 2d 132, 87 S. Ct. 199 (1966). The act of a state court is state action as that term is used in the Fourteenth Amendment; *Shelly* v. *Kraemer*, 334 U.S. 1, 92 L. ed. 1161, 68 S. Ct. 836 (1948).

On the basis of the foregoing, petitioner maintains that the finding of fact by the Appellate Court of Illinois, that petitioner was fully paid pursuant to the oral agreement, and the consequent dismissal of his amended complaint, without opportunity to a full and complete hearing on that question of fact, deprived the petitioner of property, contrary to his right to due process as guaranteed by the Fourteenth Amendment.

Accordingly, petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that

it may decide this important question of constitutional law.

(II)

The fact finding by the Appellate Court of Illinois, First District, affirmed by the Supreme Court of Illinois, was a complete departure from the Illinois rule of having a jury decide questions of fact where a trial by jury is demanded in apt time, thereby violating the right of petitioner to equal protection of the laws.

At the time of the filing of his original complaint, petitioner demanded a trial by jury (R. 3). Article II, § 5, of the Illinois Constitution of 1870 states in pertinent part as follows:

> "The right of trial by jury as heretofore enjoyed shall remain inviolate. . . ." (App. 39a).

As an implementation of this constitutional provision, Illinois has passed the following legislation regarding the finding of facts by a judge during a hearing of a motion to dismiss a complaint:

> ". . . (3) If, upon the hearing of the motion, the opposite party presents affidavits or other proof denying the facts alleged or establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion. If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer *and shall so deny it if the action is one at law and a jury demand has been filed by the opposite party in apt time.*" (Emphasis added). Ch. 110, § 48, I.R.S. (1967). (App. 41).

The constitutional guarantee of the Illinois Constitution of a right to trial by jury has been consistently

interpreted by the courts of Illinois so as to require a resolution of any dispute of fact in any lawsuit by a jury, whenever a demand is made in apt time.

> "Clearly, the Constitution does, and Judges should, carefully preserve the right of the parties to have a substantial factual dispute resolved by the jury for it is here that assessment of the credibility of witnesses may well prove decisive." *Pedrick* v. *Peoria & Eastern RR Co.*, 137 Ill. 2d 494, 229 N.E. 2d 504 (1967).

This same position is set forth in the following Illinois cases:

> *Manion* v. *Brant*, 85 Ill. App. 2d 129, 229 N.E. 2d 171 (1967).
>
> *Willoughby* v. *Moyer*, 5 Ill. App. 2d 462, 200 N.E. 2d 522 (1964).
>
> *Diversey Liquidating Corporation* v. *Neunkirchen*, 370 Ill. 523, 19 N.E. 2d 363 (1939).

The Appellate Court decided a substantial question of fact by determining that the petitioner had been fully compensated for his services performed pursuant to the oral agreement with McDonald's, even though there was considerable dispute between the parties on this question, *supra* pp. 6-7. By making this determination, the Appellate Court deprived petitioner of his right to a jury trial on this question, even though the law in Illinois is clear beyond dispute that persons in positions similar to that of petitioner are given a trial by jury.

Judicial action is state action within the meaning of the Fourteenth Amendment. *Shelley* v. *Kraemer*, *supra* p. 12. By denying petitioner the right to have this question of fact resolved by a jury, while others similarly

situated have been granted a jury trial, the State of Illinois, through its Appellate Court, denied him equal protection of the laws. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 30 L. ed. 220, 6 S. Ct. 1064 (1886); *Shelley* v. *Kraemer*, *supra* p. 12. In *Cochran* v. *Kansas*, 316 U.S. 255, 86 L. ed. 1453, 62 S. Ct. 1068 (1942), the Court determined that a prison inmate denied the privilege of appeal by actions of state officials, while others convicted of crimes were allowed such appeals, suffered a violation of his rights to equal protection of the laws. Likewise, petitioner suffered a violation of his rights to equal protection by a denial of his jury trial.

Accordingly petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of constitutional law.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLARD LASSERS,
11 South LaSalle Street,
Chicago, Illinois 60603,

EDWARD G. LEVINSON,
11 South LaSalle Street,
Chicago, Illinois 60603,

GEORGE C. PONTIKES,
11 South LaSalle Street,
Chicago, Illinois 60603:

Attorneys for Petitioner.